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Nos. 88-1182 and 88-6651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

JACQUELINE BOUKNIGHT, *Respondent,*

MAURICE M., *Petitioner,*

v.

JACQUELINE BOUKNIGHT, *Respondent.*

On Writ Of Certiorari
To The Court Of Appeals Of Maryland

BRIEF ON THE MERITS OF PETITIONER MAURICE M.

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QUESTIONS PRESENTED

1. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?

2. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS	1
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE COURT'S ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED CHILD DOES NOT COMPEL INCRIMINATING TESTIMONY PROTECTED BY THE FIFTH AMENDMENT	11
A. The Order To Produce Maurice Does Not Require His Mother To Divulge Information	13
B. The Mother Would Not Convey Testimonial Information By Producing A Child Under Her Custody	18
II. THE *PARENS PATRIAE* DUTY OF THE STATE TO PROTECT CHILDREN AT RISK OF HARM OVERRIDES THE MOTHER'S FIFTH AMENDMENT PRIVILEGE	22
A. Protecting Children Is An Inviolable Obligation Of The State	22
B. A Balance Of Interests Is Necessary To Resolve Conflicts Between Neutral Statutes And The Fifth Amendment	25
1. Noncriminal Statutes Directed At The General Public May Override The Privilege	26
2. Balancing Is Also Required By Nonstatutory Disclosure Requirements	28
C. The Compelling Interest In Protecting Children Outweighs The Privilege	30

Table of Contents Continued

	Page
1. The Vital Need For Maurice's Production Satisfies *Byers* And Other Fifth Amendment Balancing Tests	30
a. CJP §3-814(c) Is A Neutral, Noncriminal Statute Directed At A Non-Suspect Class	30
b. CJP §3-814(c) Serves A Vital Public Role	32
c. The Mother's Limited Risk Of Incrimination Does Not Justify Her Fifth Amendment Claim	33
d. The Fifth Amendment Balance Must Be Struck For The State's Duty To Protect Maurice	34
2. Rights Which Jeopardize The Life Or Health Of Children Are Not Constitutionally Protected	35
3. The Balance Must Be Struck For Maurice's Production	40
CONCLUSION	43
APPENDIX	1a

TABLE OF AUTHORITIES

Case — Page

FEDERAL CASES

Albertson v. *S.A.C.B.*, 382 U.S. 70 (1965) 27, 28, 30
Andresen v. *Maryland*, 427 U.S. 463 (1976) 12
Bellis v. *United States*, 417 U.S. 85 (1974) 20, 21, 35
BCDSS v. *Bouknight*, ___ U.S. ___, 109 S. Ct. 571 (1988) 2
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 39
Braswell v. *United States*, 487 U.S. ___, 108 S. Ct. 2284 (1988) ..... *passim*
Breed v. *Jones*, 412 U.S. 519 (1975) 32
California v. *Byers*, 402 U.S. 424 (1971) ... 11, 28, 30, 34, 35
Carey v. *Population Services International*, 431 U.S. 678 (1977) 40
Coy v. *Iowa*, ___ U.S. ___, 108 S. Ct. 2798 (1988) 11, 32, 38, 39
Curcio v. *United States*, 354 U.S. 113 (1957) 20
Deshaney v. *Winnebago County Department of Social Services*, ___ U.S. ___, 109 S. Ct. 998 (1989) 32
Doe v. *United States*, 487 U.S. ___, 108 S. Ct. 2341 (1988) ..... *passim*
Federal Communications Commission v. *Pacifica Foundation*, 438 U.S. 726 (1978) 37
Fisher v. *United States*, 425 U.S. 391 (1976) ..... *passim*
In re Gault, 387 U.S. 1 (1967) 39
Ginsberg v. *New York*, 390 U.S. 629 (1968) 37
Grosso v. *United States*, 390 U.S. 62 (1968) 27
Hale v. *Henkel*, 201 U.S. 43 (1906) 20, 29
Haynes v. *United States*, 390 U.S. 85 (1968) 27
Jehovah's Witnesses v. *King County Hospital*, 390 U.S. 598 (1968), *aff'g per curiam*, 278 F. Supp. 488 (W.D.Wash 1967) 36
Johnson v. *United States*, 228 U.S. 457 (1913) 14
Kastigar v. *United States*, 406 U.S. 441 (1972) 18
Kent v. *United States*, 383 U.S. 541 (1966) 23
Leary v. *United States*, 395 U.S. 6 (1969) 27
Marchetti v. *United States*, 390 U.S. 39 (1968) 27, 30
May v. *Anderson*, 345 U.S. 528 (1953) 23
McCarthy v. *Arndstein*, 266 U.S. 34 (1923) 29, 35

Table of Authorities Continued

Page

Murphy v. *Waterfront Comm'n*, 378 U.S. 52 (1964) 18
New York v. *Ferber*, 458 U.S. 747 (1982) 11, 37, 40
New York v. *Quarles*, 467 U.S. 649 (1984) 11, 29, 30, 35
Palmore v. *Sidoti*, 466 U.S. 429 (1984) 24
Parham v. *J.R.*, 442 U.S. 584 (1979) 39
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987) 32, 34, 39
Pillsbury v. *Conboy*, 459 U.S. 248 (1983) 42
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) 40
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 10, 24, 35, 36, 37
Schmerber v. *California*, 384 U.S. 757 (1966) 12, 17
Shapiro v. *United States*, 335 U.S. 1 (1948) 27, 35
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 39
South Dakota v. *Neville*, 459 U.S. 553 (1983) 18
Skinner v. *Railway Labor Executives Ass'n*, ___ U.S. ___, 109 S. Ct. 1402 (1989) 38
Tennessee v. *Garner*, 471 U.S. 1 (1985) 38
United States v. *Bryan*, 339 U.S. 323 (1950) 14
United States v. *Campos-Serrano*, 430 F.2d 173 (7th Cir. 1970) 22
United States v. *Doe*, 465 U.S. 605 (1984) 13, 42
United States v. *Rylander*, 460 U.S. 752 (1983) 16
United States v. *White*, 322 U.S. 694 (1944) 21
United States v. *Sullivan*, 274 U.S. 259 (1927) 27
Wilson v. *United States*, 221 U.S. 361 (1911) 20, 21, 27
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 37
Wyman v. *James*, 400 U.S. 309 (1971) 38

STATE CASES

Bergmann v. *State*, 486 N.E.2d 653 (Ind.App. 1985) ... 37
Commonwealth v. *Barnhart*, 345 Pa. Super. 10, 497 A.2d 616 (1985), *app. denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 55 (1988) 37
Commonwealth v. *Hughes*, 380 Mass. 583, 404 N.E.2d 1239, *cert. denied*, 449 U.S 900 1980 22
In re John P., 311 Md. 700, 537 A.2d 263 (1988) 31, 32
In re Maurice M., 314 Md. 391, 550 A.2d 1136 (1988) 1, 8, 9, 10, 13, 15, 19

Table of Authorities Continued

	Page
In re Neil C., 308 Md. 591, 521 A.2d 329 (1987)	31
In re Willmann, 24 Ohio App. 3d 191, 493 N.E.2d 1380 (1986)	37
People in Interest of D.L.E., 645 P.2d 271 (Colo. 1982)	37
State v. *Dennis*, 16 Wash. App. 417, 558 P.2d 297 (1976)	22
State v. *Alexander*, 281 N.W.2d 349 (Minn. 1979)	22
Walker v. *Superior Court (People)*, 47 Cal. 3d 112, 253 Cal. Rptr. 1, 763 P.2d 852 (1988), *cert. filed*, 57 U.S.L.W. 3622 (U.S. March 6, 1989) (No. 88-1471)	36
Wentzel v. *Montgomery General Hospital*, 293 Md. 685, 447 A.2d 1244 (1982), *cert. denied*, 459 U.S. 1147 (1983)	24

CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment	*passim*
United States Constitution, First Amendment	11, 36, 40
United States Constitution, Fourth Amendment	1, 11, 37, 38, 40
United States Constitution, Sixth Amendment	1, 11, 17, 38, 40
United States Constitution, Fourteenth Amendment	1, 39, 40

STATUTES

28 U.S.C.A. § 1257(3) (West 1983)	20
Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C.A. §§ 620-627, 670-676 (West 1983)	1, 41, 42
Child Abuse Prevention and Treatment Act, 42 U.S.C.A. § 5101 *et seq.* (West 1983)	41, 42
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 3-801(e)	1, 3, 31
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 3-802	1, 24, 31, 41
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 3-814(c)	1, 15, 26, 30, 33
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 3-815(b)(1)	1, 3
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 3-831	1, 31
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 9-108	1, 16
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 9-110	1, 16
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 9-111	1, 16

Table of Authorities Continued

	Page
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 12-303(3)(x) (1988 Supp.)	1, 15
Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) § 12-701(b)	1, 15
Md. Fam. Law Code Ann. (1984 Repl. Vol.) § 5-203(b)	1, 20
Md. Fam. Law Code Ann. (1984 Repl. Vol.) § 5-706(b)	1, 20, 33
Md. Fam. Law Code Ann. (1984 Repl. Vol.) § 10-219(a)	1, 20

RULES

Supreme Court Rule 17.1(c)	2
Md. Rule 906(a)	1, 3
Md. Rule 906(b)(2)	1, 3
Md. Rule 910(b)	1,33
Md. Rule 911(a)	1, 15
Md. Rule 915(d)	1, 33
Md. Lawyers' Rules of Professional Conduct Rule 1.6	1, 16

OTHER AUTHORITIES

American Association for Protecting Children, American Humane Association, *Highlights of Official Child Neglect and Abuse Reporting 1987* (1986) and (1989)	25
American Bar Association, *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties* 3.1(b)(ii)[6] (1980)	33
Brief of Amicus Commonwealth of Massachusetts	33
Brief of Amicus Charles M.	33
Brief of Amicus U.S. Conference of Mayors	42
Children's Defense Fund, *A Vision for American's Children* (1989)	32
H.R. REP. NO. 260, 100th Cong. 1st Sess. Table I (Comm. Print, July 31, 1987)	25
W. LaFave and J. Israel, 2 *Criminal Procedure* § 19.4 (1988 Supp.)	17
National Council of Juvenile and Family Court Judges, *Judicial Authority and Responsibility: 18 Recommendations on Issues in Delinquency and Abuse/Neglect Dispositions* (1989)	33

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The "self-incrimination clause" of the Fifth Amendment to the Constitution of the United States provides as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The following provisions and sections of the U.S. Constitution, the U.S. Code, the Maryland Code and the Maryland Rules are involved in this case and are set forth in the Appendix to this brief: U.S. CONST. amendments, I, IV, VI, and XIV; 42 U.S.C.A. § 671(a)(15)(B) (West 1983); Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) ("CJP") § 3-801(e); § 3-802; § 3-814(c); § 3-815(b)(1); § 3-831; § 9-108; § 9-110; § 9-111; § 12-303(3)(x) (1988 Supp.); and § 12-701(b); Md. Fam. Law Code Ann. (1984 Repl. Vol.) ("FL") § 5-203(b); § 5-706(b); and § 10-219(a); and Md. Rules 906(a); 906(b)(2); 910(b); 911(a); 915(d); 1.6.

OPINIONS BELOW

The opinions of the Court of Appeals of Maryland ("Maryland court") are reported at 314 Md. 391, 550 A.2d 1136 (1988). The judgment of the Maryland court denying a motion for rehearing is contained in petitioner Maurice M.'s Appendix C to his Petition for a Writ of Certiorari, at 45a, and has been printed in petitioner Baltimore City Department of Social Services' ("BCDSS") Appendix to its Petition for a Writ of Certiorari, at p. 14a. The orders of the Circuit Court for Baltimore City, Division for Juvenile Causes, are unreported and contained in Maurice M.'s Petition Appendix and printed in BCDSS' Petition Appendix at 81a-87a.

JURISDICTION

The decision of the Maryland court was entered on December 19, 1988. On the same date, the Maryland court denied a timely Motion for Rehearing. Chief Justice

William H. Rehnquist, sitting as Circuit Justice for the Fourth Circuit, temporarily stayed the Maryland court's judgment on December 19, 1988. After receiving responses from all parties to the application for a stay, Chief Justice Rehnquist extended the stay on December 21, pending the filing of a petition for a writ of certiorari and full consideration by this Court. *BCDSS* v. *Bouknight*, ___ U.S. ___, 109 S.Ct. 571 (1988). BCDSS and Maurice M. filed petitions on January 18 and 23, 1989, respectively, which were granted and consolidated on April 3, 1989. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(3) (West 1983) as the petitions were filed within 90 days of the Maryland court's judgment and present important questions of federal law. S.Ct. Rule 17.1(c).

STATEMENT OF THE CASE

Petitioner Maurice M. is a child at risk. By the time he was four months old, he had suffered repeated injuries and was judicially removed from the care of his mother. Reunification services ensued, and, five months later, the Baltimore juvenile court returned Maurice to his mother and ordered therapeutic services and official monitoring. Less than a month after formal custody was restored, Maurice disappeared from the reach of the child welfare workers responsible for his protection. Seven months later, when the workers notified the juvenile court of their fear for his safety, the court ordered his mother to produce Maurice immediately. The mother refused to comply, citing first her opposition to his return to foster care and, following her incarceration for contempt, her Fifth Amendment privilege against self-incrimination. The impasse has now lasted for over a year, as the mother continues to violate the order by concealing Maurice's whereabouts.

Maurice was born on October 3, 1986 to Jacqueline Bouknight, herself the product of Baltimore's foster care system. (J.A. 29). Within the next four months, Maurice was hospitalized twice with numerous serious fractures.[1] His orthopedist concluded that the early onset of these injuries, coupled with their multiplicity and extremely unusual locations, raised "very high" suspicions of child abuse and concerns of "serous or fatal injuries absent corrective treatment." (J.A. 12). During the second hospitalization, his mother was observed throwing him into a crib on one occasion and shaking him profusely on another. (J.A. 16).

On February 11, 1987, following an abuse referral from the hospital, petitioner BCDSS filed a petition in the juvenile court alleging that Maurice was a Child in Need of Assistance ("CINA")[2] requiring the juvenile court's protection due to the allegations of abuse, the mother's inadequate explanation for his injuries, and the father's recent incarceration on drug charges. (J.A. 8-9). Later that day, the juvenile court placed the infant in shelter care, an emergency foster care status.[3] Both Maurice and Ms. Bouknight were represented by separate court-

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[1] During the first hospitalization, fractures were found in his right humerus (upper arm), scapula (shoulder blade) and glenoid (shoulder socket). (J.A. 11). On January 23, 1987, Maurice was again hospitalized when his left femur (thigh) was broken, requiring a spica (full body) cast, and his upper right arm was immobilized, suggesting a spinal cord injury, nerve damage in the shoulder joint, or birth palsy. (J.A. 11-12, 15).

[2] CJP § 3-801(e) defines a CINA in part as a child who does not receive ordinary and proper care and attention and whose parents are unable or unwilling to give him proper care and attention.

[3] The juvenile court is authorized to grant shelter care whenever necessary to protect the child. CJP § 3-815(b)(1).

appointed counsel at the shelter care hearing and all subsequent proceedings.[4]

So long as Maurice remained in the Department's custody, Ms. Bouknight cooperated fully with BCDSS and its recommended service providers. She initiated and participated regularly in counseling sessions. (J.A. 29-32). By summertime, Ms. Bouknight had completed parenting classes and begun an optional course, had worked cooperatively with an in-home aide, and had participated in a specialized therapy program designed to correct abusive parent-infant relationships. (J.A. 27).

At an adjudicatory hearing on May 19, 1987, the essential allegations in the petition were sustained by the parties' stipulation of facts, but a final disposition was delayed while the mother's counsel arranged and secured a psychological evaluation of her client. (J.A. 2). When the evaluation was not available for the rescheduled hearing on July 17, the juvenile court, aware of the mother's progress with her rehabilitative services, ordered that Maurice be returned directly to his mother with the caveat that an unfavorable report could rescind the provisional order and revert shelter care to BCDSS. *Id.*

At the next hearing on August 18, the mother regained custody of Maurice by an agreement of the parties which was approved by the court in a dispositional order. (J.A.

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[4] All children involved in CINA proceedings are entitled to be represented by their own counsel. Md. Rule 906(a). The Maryland Department of Human Resources contracts with the Legal Aid Bureau, Inc. to represent children in most CINA cases. In 1988, the Legal Aid Bureau represented more than 3,000 children at hearings on new CINA petitions and appeared in approximately 3,200 CINA court reviews. Indigent parents are represented by the Maryland Office of the Public Defender. Md. Rule 906(b)(2).

2-3, 27-28). BCDSS was required to provide protective supervision of the placement and report to the court every six months. In turn, the mother was ordered to cooperate with the Department, to attend individual therapy and the specialized parenting program, to work with the parent aide, and to refrain from physically punishing Maurice. (J.A. 27-28). Neither BCDSS nor the mother's counsel produced the psychological evaluation at the hearing, but the court was informed by BCDSS that the report was negative and opposed to reunification. (J.A. 124-36).

Shortly after custody was restored, the mother ended all cooperation with BCDSS and the array of court-ordered rehabilitative services. (J.A. 79-82). All seven visits scheduled by the parent aide from September 15 through December 8 were thwarted by Ms. Bouknight, who cancelled three times, twice was not home or failed to answer the door, and twice claimed that one year old Maurice was not at home. (J.A. 79-80). The protective services worker fared no better in his two attempted home visits. (J.A. 80-81).

No contact at all occurred between Ms. Bouknight and BCDSS throughout the following winter, and no BCDSS employee has seen Maurice since September 8, 1987. (J.A. 79-81). On March 22, 1988, BCDSS learned that the mother "was wandering about in a daze," devastated by the recent shooting death of Maurice's father. (J.A. 81). The protective services worker was notified, and he soon discovered that the mother had not scheduled any therapy or medical appointments since August 1987. (J.A. 81-82). On April 8, 1988, one day after contacting the mother, BCDSS petitioned the court to review the case, claiming, in part, that the mother had frustrated its efforts to monitor the home, had refused to reveal the child's whereabouts, had not utilized therapeutic intervention as

ordered, and had been psychologically evaluated to be a serious risk to the infant's safety.[5] When the mother continued to refuse to produce the child or reveal his whereabouts, BCDSS filed a petition for contempt and asked for an order that the child be produced to the court. (J.A. 36-39).

Ms. Bouknight maintained that Maurice was healthy and appropriately placed with relatives. (J.A. 82-83, 87). One member of her extended family claimed to have seen Maurice as recently as March 23, 1988, and another reported having seen him in February. (J.A. 81, 91). Nevertheless, a search proved fruitless, as each alleged caretaker denied having the child. (J.A. 86-91). A homicide investigation was initiated on April 14 when fears for the child's welfare mounted, but no evidence of harm was discovered.

Ms. Bouknight failed to attend a hearing scheduled for April 20, although personally served with a summons and reminded several times by her attorney that both she and Maurice were due in court that day. (J.A. 4, 42). The juvenile court ordered shelter care of the infant to BCDSS and ordered the mother to show cause why she should not

[5] The evaluation was conducted on July 27, 1987 by a psychologist chosen by Ms. Bouknight's therapist and attorney. (J.A. 2, 136). The report was finally obtained by BCDSS on September 8, 1987 but was not provided to the court or counsel until April 19, 1988. (J.A. 124-36). It strongly advised against reunification, and among its most chilling findings for the potential of abuse was the following section:

> She is not now able to relate constructively to her child, since her child is seen as fulfilling her needs rather than the reverse. She becomes totally frustrated and enraged to find herself unable to gain from her child what she wishes as a replacement for what she lack[ed] in her own childhood. When her frustration mounts, she is likely to act out toward the child and see the child as abusive to her rather than herself as abusive to the child.

(J.A. 25).

be held in contempt for failing to appear and produce the baby in court. (J.A. 4).

On April 27, 1988 the mother was located, arrested, and brought to the juvenile court which continued the mother's detention overnight to allow the police to verify her assertion that Maurice had been placed with her sister in Dallas. (J.A. 61, 67). When BCDSS reported on April 28 that the Dallas police had stated that Maurice was not with his aunt, (J.A. 73), the juvenile court found the mother in civil contempt but explained that the citation could be purged by producing Maurice to the court or revealing his whereabouts. (J.A. 74). Ms. Bouknight was remanded to jail, where she remains incarcerated.[6]

The mother has never asserted as a defense to the contempt citation that she is unable to produce Maurice. Similarly, her violations of the shelter care order, the summons to appear in court, and even the April 20 bench order to produce Maurice were neither challenged in the trial court nor subsequently appealed. Instead, on April 28, her attorney noted that the opportunity to purge might not be constitutional if it would require admission to a crime. (J.A. 72). Ultimately, on May 18, the mother asserted her Fifth Amendment privilege as justification for refusing to produce the child. (J.A. 103). Legal memoranda were submitted by all parties,[7] and on May 26, the

[6] She is also now incarcerated for a September 27, 1988 conviction of burglary. Petitioner BCDSS' Supplement to Emergency Motion for Stay of Judgment Pending Filing and Disposition of Petition for Writ of Certiorari, at 1 (December 20, 1988), U.S. Sup.Ct. No. A-494.

[7] Petitioners' counsel argued that compulsory production of the child was required as the child was not testimonial physical evidence. Maurice's counsel also argued that the court must balance the interest of children in receiving protection from abuse or neglect against

court held that since non-communicative methods were available to produce Maurice, the contempt order did not compel testimonial information in violation of the Fifth Amendment. (J.A. 157-58). The mother appealed the contempt citation that day.

On December 19, 1988 the Maryland court vacated the juvenile court's contempt citation and ordered Ms. Bouknight's release. The decision relied specifically on the mother's incarceration as creating the need for "testimony":

> To purge the contempt order and thereby free herself from imprisonment, Bouknight must impart information to someone sufficient to permit Maurice to be produced in court, or provide information of his present whereabouts. Should she do so, Bouknight will necessarily admit a measure of continuing control and dominion over Maurice's person.

In re Maurice M., 314 Md. 391, 404, 550 A.2d 1135, 1141 (1988). The court also refused to balance the possible threat of self-incrimination against the clear risks to Maurice and other children requiring judicial protection:

> While it may be argued that the Juvenile Causes Act absolutely requires that Bouknight produce Maurice in court or provide information as to his location, and thus bears some kinship to a statutory reporting requirement, we simply are unable in the [sic] circumstances to, in effect, totally expunge Bouknight's Fifth Amendment rights where the risk of prosecution is so substantial. Assuming, arguendo, that there may be causes in which a balancing test is

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the risk of their parents' possible self-incrimination, and that the mother could not collaterally attack a valid court order to produce the child. (R. 75, 77). The court dismissed the mother's Fifth Amendment claim on the basis of the petitioners' arguments. (J.A. 157).

> appropriate to determine the existence of the Fifth Amendment privilege, we conclude that the case before us is not one of them.

Id. at 409, 550 A.2d at 1143-44. Two members dissented and noted that the majority had ignored "the significant societal interest in the welfare of the child." *Id.* at 415, 550 A.2d at 1147.

Later that day, the Maryland court denied BCDSS' motion for rehearing, but Chief Justice William H. Rehnquist, sitting as Circuit Justice, temporarily stayed the Maryland court's judgment. After receiving responses from all parties, Chief Justice Rehnquist extended the stay pending the filing of a petition for certiorari and full consideration by the Court. BCDSS and Maurice filed petitions on January 18 and 23, respectively, which were granted and consolidated by the Court on April 3, 1989.

SUMMARY OF ARGUMENT

I. A. The order to bring her son Maurice to the juvenile court no more violates Ms. Bouknight's Fifth Amendment rights than it would if it required her to provide a blood sample, produce records, or sign authorizations. None of these demands, including the production of Maurice, are testimonial as the act of producing them does not assert incriminating information. *Fisher* v. *United States*, 425 U.S. 391, 408 (1976). Maurice can be produced without his mother "utter[ing] a sound", *In re Maurice M.*, 314 Md. at 404, 550 A.2d at 1141, so there is no question that his production is non-testimonial. His physical condition does not implicate the privilege, and his mother has never indicated that she cannot comply with the order. Ms. Bouknight's incarceration for contempt is not an attempt by the juvenile court to coerce her to divulge facts about Maurice. Instead, the purpose of

the valid, unappealed order to produce Maurice is to assure his protection.

B. Prior to her incarceration, she had broad options for arranging Maurice's anonymous appearance in court. Currently, Ms. Bouknight still has non-testimonial, private, and privileged means of complying with the order. Communication of his whereabouts to her attorney or other privileged confidants would not be traceable to her. *Fisher*, 425 U.S. at 403-04. Ms. Bouknight stands in the same shoes as the custodial agents in *Braswell* v. *United States*, 487 U.S. ___, 108 S.Ct. 2284 (1988), and *Doe* v. *United States*, 487 U.S. ___, 108 S.Ct. 2341 (1988). By regaining custody of Maurice, she accepted the obligation to produce him upon the court's command. The Maryland court's equation of Maurice to artifacts of crime is factually and legally unsupportable. The facts of this case do not implicate the Fifth Amendment.

II. A. Notwithstanding the mother's possible privilege, protecting children in jeopardy of serious harm is an inviolable obligation of the state under its *parens patriae* power. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). Juvenile courts, vested with *parens patriae* powers, have the authority to moderate parents' rights when necessary to shield children from harm. At a time when child abuse and neglect have surpassed epidemic proportions, the power of juvenile courts to compel a child's production must be clear and unequivocal.

B. This Court has readily resolved tensions between compelling public needs and Fifth Amendment rights by balancing the interests involved. Exceptions for required records and mandatory disclosures of information have evolved into a balancing test which assesses the neutral, noncriminal purpose of the statute, its applicability to the

general public, and its broad focus on a noncriminal class. *California* v. *Byers*, 402 U.S. 424, 430-31 (1971). Even where the state's demands are not based on a statute or regulation, Fifth Amendment rights can be outweighed by exigent public safety needs. *New York* v. *Quarles*, 467 U.S. 649, 657 (1984).

C. Maryland's Juvenile Causes Act is a neutral, noncriminal statute aimed at parents whose children require the assistance of the juvenile court. The court is a civil and therapeutic forum intended to assist families, not to punish parents. This Court has had increasing occasion to address child abuse and neglect issues, "a problem of disturbing proportions in today's society." *Coy* v. *Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 2803 (O'Connor, J. concurring). Faced with rampant child abuse, juvenile courts must have the authority to compel production. Parents' assertions of their First, Fourth, and Sixth Amendment rights are not constitutionally protected if they jeopardize the life, health or safety of children. The "State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York* v. *Ferber*, 458 U.S. 747, 756-57 (1982) (citation omitted). Even constitutional rights of criminal suspects are subject to modification if their assertion might injure specific children. *Coy* v. *Iowa*, 108 S.Ct. at 2803. No alternatives exist for Maurice's safety other than striking a balance in support of the order of production.

ARGUMENT

I. THE COURT ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED CHILD DOES NOT COMPEL INCRIMINATING TESTIMONY PROTECTED BY THE FIFTH AMENDMENT.

It is well-settled Fifth Amendment doctrine that individuals can be compelled to produce tangible objects or

perform involuntary acts without infringing their privilege against self-incrimination. Blood samples, voice and handwriting exemplars, the modeling of clothing, corporate records, and signatures to authorization forms all can be compelled precisely because their production neither involves direct testimony nor asserts testimonial facts. The production of a child placed in his mother's custody should be compelled just as readily.

The mother's claim of privilege disregards the limited scope of the juvenile court's order. At most, the court required the appearance of Maurice through methods or means unknown; the availability of alternative methods for securing Maurice's appearance eliminates any testimonial element. Moreover, even if the mother were required to produce the child herself, she would convey scant incriminatory testimony since she is under a court order to maintain Maurice in her physical as well as legal control.

The privilege against self-incrimination does not shield individuals from compulsory disclosure of incriminating information. Instead, it only applies when the state compels testimony: "The 'historic' function of the privilege has been to protect a "'natural individual from compulsory incrimination through his own testimony or personal records.'" '" *Andresen* v. *Maryland*, 427 U.S. 463, 470-71 (1976) (citations omitted). Unlike testimony or communications, real or physical items which do not convey the thoughts of an individual are not protected. *Schmerber* v. *California*, 384 U.S. 757, 762-63 (1966).

In recent years, the Court has crystalized the "testimonial" analysis to permit disclosure of physical objects and most records unless the act of production infers incriminating facts of existence, authenticity, or control.

Fisher v. *United States*, 425 U.S. 391, 411 (1976); *United States* v. *Doe*, 465 U.S. 605, 613-14 (1984) (*"Doe I"*). Where the testimonial information conveyed by producing the item is slight, either because the individual's legal position already presumes the capacity and duty to comply, *Braswell* v. *United States*, 487 U.S. ___, 108 S.Ct. 2284, 2291 (1988), or the action conveys no information to the government, *Doe* v. *United States*, 487 U.S. ___, 108 S.Ct. 2341, 2347 (1988) (*"Doe II"*), it does not trigger the privilege. Under these clear-cut tests, Maurice's production can be compelled since his mother is already assumed to have control over her son and since she can satisfy the order without communicating a word to the government.

The Maryland court acknowledged but failed to apply these standards. It relied on inapplicable considerations, such as the mother's incarceration for contempt, to establish a compulsion to communicate even though her words could remain privileged and private. The court provided no analysis or guidance to justify its sweeping conclusion that any appearance of the child would necessarily implicate the mother's continuing control and dominion. Even the sole legal rationale provided by the Maryland court—an analogy to criminal cases in which suspects or defendants cannot be compelled to yield either illegal contraband or the instruments of a crime—rests on the unacceptable equation of a child with an artifact of crime. The Maryland court has ignored this Court's repeated admonition that non-testimonial acts are not privileged.

A. The Order To Produce Maurice Does Not Require His Mother To Divulge Information.

As the Maryland court concedes, the order requiring Maurice's production does not compel Ms. Bouknight "to utter a sound." *In re Maurice M.*, 314 Md. at 404, 550

A.2d at 1141 (1988). Thus, unless his appearance itself casts inferences of her control and knowledge, it cannot abridge the Fifth Amendment. As Justice Holmes stated, "a party is privileged from producing evidence, but not from its production," *Johnson* v. *United States*, 228 U.S. 457, 458 (1913). Maurice's production has never required the mother's direct or discoverable participation, and not even the Maryland court suggests that adverse testimonial inferences could be drawn from Maurice's simple appearance at court. The juvenile court frequently remarked that a verified discovery of Maurice by anyone, at any location, would satisfy its order. Ms. Bouknight's attorney, the child's current caretaker, or anonymous tips could all secure the child's production without risk of incrimination to Ms. Bouknight.

Because the mere physical presence of the infant would not implicate the privilege, his relative condition at the time of discovery is also not testimonial. The testimonial analysis is never affected by the level of incrimination which could result from production. Thus, even if Maurice were to have discoverable injuries potentially attributable to abuse, the severity of those injuries would have no bearing on whether his production asserts testimonial facts.

Should the mother be unable to produce him, she can always communicate that claim through her counsel's proffer to the court without incriminating herself in a subsequent criminal trial. "Ordinarily, one charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to comply." *United States* v. *Bryan*, 339 U.S. 323, 330 (1950). Until she affirmatively raises the issue of impossibility, however, it is premature to guess the juvenile court's possible response.

The Maryland court skirted these issues because it never addressed the fundamental question before this

Court: whether the juvenile court has plenary authority to order a parent to produce a previously victimized child despite her Fifth Amendment claim. The court relied on the mother's incarceration as somehow requiring her to communicate instructions to an individual which would "necessarily admit a measure of continuing control and dominion over Maurice's person." *In re Maurice M.*, 314 Md. at 404, 550 A.2d at 1141. While her confinement may pose burdens, it neither alters the original obligation to produce Maurice nor eliminates her non-testimonial options.

Contrary to the Maryland court's analysis, Ms. Bouknight is not incarcerated because the juvenile court sought to determine from "her own mouth" where Maurice is located or what circumstances prompted his disappearance. Rather, she remains in jail for her consistent defiance of valid bench orders for the production of Maurice. No order or summons has compelled her to communicate facts to the state—producing Maurice would suffice.

The mother cannot plead the penalties imposed for her contumacious behavior as justification for her decision to violate judicial directives. At no point has the mother challenged the constitutional validity of the orders she violated.[8] Even after her arrest, she chose to appeal the

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[8] The mother had numerous opportunities to challenge the juvenile court's authority prior to the contempt hearings of April 28, May 18 and May 26, 1988. Under Md. Rule 911(a), her counsel could have sought an immediate exception to review the master's order of shelter care. She could have also appealed pursuant to CJP § 12-303(3)(x) (1988 Supp.) and sought a stay. CJP § 12-701(b). Other remedies were also available, including a motion to quash the summons, a request to reconsider the original order of protective supervision or an appeal of the bench orders that she present Maurice to court pursuant to CJP § 3-814(c).

contempt order but not the preceding orders for production of her son. The practice of collaterally attacking orders of production at contempt proceedings is barred because it "convert[s] . . . the privilege from [a] shield against compulsory self-incrimination . . . into a sword whereby a claimant asserting the privilege would be freed from producing evidence in support of a burden which would otherwise have been his." *United States* v. *Rylander*, 460 U.S. 752, 758 (1983). Since Ms. Bouknight invited sanctions when she violated valid orders, she cannot now assert those penalties as the basis for rendering compliance unconstitutional. Her incarceration cannot furnish the grounds for a backdoor constitutional challenge of the original order.

Imprisoning Ms. Bouknight might hinder her ability to produce Maurice, but it does not transform his production into a testimonial act. Even if the contempt citation were a valid consideration at this point, it would have no effect on the testimonial analysis.

Throughout these proceedings, the court reminded the mother repeatedly that she had available any number of "silent" methods of purging her contempt without compromising her privilege. An anonymous phone call to the police; a confidential instruction to her attorney, clergy, or other privileged confidants, *see* CJP §§ 9-108, 9-110, and 9-111; or a call to the child's caretaker, could all lead to Maurice's discovery without an incriminating statement or act by the mother. At a minimum, the attorney-client privilege undoubtedly shields any statements to her attorney. *Fisher* v. *United States*, 425 U.S. at 403-05; *Md. Lawyers' Rules of Professional Conduct* Rule 1.6. Since the attorney's subsequent actions in securing Maurice's discovery could neither be discovered by the state nor, if already known, used in a criminal proceeding against the

mother,[9] her original directive would remain confidential and nonincriminatory.

The Maryland court cites no authority for its novel position that confidential communication is embraced by the privilege merely because it is compelled and may result in eventual incrimination. So long as the mother's instruction is not disclosed to the state, it is not testimony: "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe II*, 108 S.Ct. at 2347. The Maryland court confuses the initial "communication" standard of *Schmerber* with *Fisher's* subsequent admonition that a valid Fifth Amendment claim arises "only when [a person] is compelled to make a *testimonial* communication that is incriminating." 425 U.S. at 408 (emphasis in original).[10] If the compelled

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[9] On Sixth Amendment grounds alone, the attorney's role must remain confidential. The subsequent actions of the attorney would also be protected by the attorney-client privilege:

> If, however, the client gave the evidence to the attorney (or told the attorney where to find it) in the course of seeking legal advice, the attorney-client privilege will bar the prosecution from compelling the attorney to testify as to how he obtained the material. Indeed, where identification of the attorney as the person who produced the item would suggest to the jury that the attorney had received it from his client, the prosecution has been precluded from using that fact in evidence.

W. LaFave and J. Israel, 2 *Criminal Procedure* § 19.4, 124 (1988 Supp.) (footnotes deleted).

[10] *Schmerber* acknowledged the problem of distinguishing between a possible application of the Fifth Amendment to all communications or limiting the privilege to those communications with testimonial qualities, as Wigmore had advocated. 384 U.S. at 763 n.7. While *Schmerber* refrained from adopting Wigmore's stricter testimonial standard, the *Fisher* Court specifically endorsed a testimonial standard. 425 U.S. at 408. *See also Doe II*, 108 S.Ct. at 2347 n.8.

information cannot be used as testimony or relied upon by the state in subsequent prosecutions against the mother, it is not protected—the privilege protects one only "from having to share his thoughts and beliefs with the government." *Doe II*, 108 S.Ct. at 2349.[11] As *Doe II* noted, "directing the recipient of a communication to do something is not an assertion of fact or, at least in this context, a disclosure of information." 108 S.Ct. at 2351.

Ms. Bouknight remains a constitutionally free actor despite her loss of liberty. When "safe, painless, and commonplace" alternatives are provided which do not themselves infringe a privilege, no unconstitutional coercion is present. *South Dakota* v. *Neville*, 459 U.S. 553, 563 (1983). Since her options risk no greater penalty than that originally imposed by the juvenile court—temporary loss of custody of her son—they do not present "the cruel trilemma" of self-accusation, perjury, or contempt proscribed by the Fifth Amendment. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

B. The Mother Would Not Convey Testimony By Producing A Child Under Her Custody.

Even if no alternatives were available to the mother and she were required to produce Maurice directly, her

[11] Since the state would never know of, and thus could never use, the privileged statement of the mother, she is in a similar position to that of a witness offered use immunity—her words cannot be applied to incriminate herself directly or indirectly. *See Kastigar* v. *United States*, 406 U.S. 441, 453 (1972) (use immunity only ensures that the testimony will not lead to criminal sanctions against the witness). Indeed, the only distinction is that her privileged instruction may ultimately lead to the production of Maurice, but if the mother is not implicated in his discovery, his production is non-testimonial. "Th[e] prohibition of derivative use assumes that the suspect's initial privileged communication is testimonial." *Doe II*, 108 S.Ct. at 2346 n.6.

actions would not imply testimonial facts of control which could incriminate her.[12] Ms. Bouknight has been Maurice's custodian, and, as such, she would not reveal any additional facts concerning his control or dominion which are not already known by the juvenile court. Her actions would add "little or nothing to the sum total of the Government's information" and thus have only "minimal testimonial significance." *Fisher* v. *United States*, 425 U.S. at 411. The order of protective supervision specifically required Maurice's placement with his mother. (J.A. 3). If Ms. Bouknight had honored that order by producing her child upon the court's demand, she at most would have confirmed that she had maintained legal and actual custody as directed.

Formal custodial relationships can override the privilege against testimonial acts of production. Traditionally, custodial agents of "collective entities" cannot invoke the Fifth Amendment to negate an otherwise appropriate request for production. *Braswell* v. *United States*, 108 S.Ct. at 2291. In justifying the states' power to compel custodians to produce materials, four separate approaches have emerged, all directly analogous here: (a) a legally sanctioned relationship; (b) ability to comply without testifying; (c) diminished expectation of privacy; and (d) public policies supporting production.

First, parents and corporate custodians are both bound by strict legal relationships. When Ms. Bouknight accepted custody of Maurice, she assumed specific responsibilities to maintain appropriate care and supervision and thereby established a binding presumption of her

[12] The other possible testimonial assertions, identity and existence, are self-evident. *See In re Maurice M.*, 314 Md. at 414, 550 A.2d at 1146 (McAuliffe, J. dissenting).

continuing care and dominion. FL §§ 5-203(b), 10-219(a). Ms. Bouknight's actions would confirm only what the law already presumes: he is her child, placed in her control by court order. While familial relations are not collective entities, corporate records custodians do have custodial obligations analogous to parental obligations. Agents of collective entities benefit from "special privileges and franchises" conferred by the state, but they are bound by duties to permit inspection and monitoring, *Hale* v. *Henkel*, 201 U.S. 43, 74 (1906), and "to produce corporate records on proper demand by the Government." *Braswell* v. *United States*, 108 S.Ct. at 2291. The mother's burden of producing Maurice on "proper demand" is an obvious incident to the custody award. If parents are entitled to full constitutional protection of their special relationships with their children, they must honor the obligations which accompany those rights.

Second, Ms. Bouknight is not being compelled to testify. Both *Curcio* v. *United States*, 354 U.S. 113, 124-25 (1957), and *Braswell* v. *United States*, 108 S.Ct. at 2293, distinguish between orders requiring custodians to perform an essentially mechanical task—production of unprivileged objects—and those compelling a witness to testify orally. In situations where possession is presumed by law, such as the custody of a child, only oral testimony beyond the mere act of production triggers the Fifth Amendment.

Third, the mother's privacy interest was diminished when the court found Maurice to be a CINA. A similar diminution of privacy in maintaining corporate records animates, in large part, the Court's consistent refusal to extend the privilege to a collective entity. *Bellis* v. *United States*, 417 U.S. 85, 91-92 (1974); *Wilson* v. *United States*, 221 U.S. 361, 382 (1911). *Wilson* relied on "the reservation

of the visitatorial power of the State" to override the privilege, *id.*, an almost precise description of BCDSS' powers under the order of protective supervision.

Finally, long before balancing private and public concerns dominated constitutional analysis, this Court recognized that the inherent and necessary power of federal and state governments to enforce their laws could influence the Fifth Amendment's reach. *United States* v. *White*, 322 U.S. 694, 700-01 (1944). Subsequently, *Bellis* acknowledged a fear that the privilege would "largely frustrate legitimate governmental regulation of [collective] organizations" as a valid basis for restricting the privilege. 417 U.S. at 90. Policy concerns still shape the collective entity custodian analysis, as *Braswell* focused on "a detrimental impact on the Government's efforts to prosecute 'white-collar crime', one of the most serious problems confronting law enforcement." 108 S.Ct. at 2294. These concerns pale when compared to the vital priority of protecting Maurice and other children at risk. The child welfare system and the children who depend on it certainly deserve as much deference as this Court accords to economic interests in regulating corporate excess and policing white collar crime.

The Maryland court failed to apply the facts of this case to a rigorous *Fisher* analysis. "'The difficult question of whether compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case.'" *Doe II*, 108 S.Ct. at 2350, *quoting Fisher*, 425 U.S. at 410. Pertinent considerations such as Maurice's infancy, Ms. Bouknight's grant of custody, and the civil nature of CINA proceedings were ignored. Instead, the court relied exclusively on criminal cases which had barred production of either illegal contraband or the suspected instru-

mentalities of criminal acts, all deliberately sought to aid in prosecutions. In one case involving a forged alien registration card, the court explicitly limited the prohibition against production to criminal inquiries solely concerned with proving a crime:

> Since the purpose of these cards is non-criminal, the fifth amendment privilege should not prevent production in the normal immigration inquiry situation . . . . However, when the inquiry itself is directed at determining a criminal violation such as in this case where the agents are looking for forged "cards" and the defendant's card had previously been examined, the privilege should apply.

United States v. *Campos-Serrano*, 430 F.2d 173, 176 (7th Cir. 1970).

More important, these criminal cases demanded active participation of the suspect to comply with a court directive. *Commonwealth* v. *Hughes*, 380 Mass. 583, 404 N.E.2d 1239, *cert. denied*, 449 U.S. 900 (1980), and *State* v. *Alexander*, 281 N.W.2d 349 (Minn. 1979), involved judicial commands where authentication by the suspect was the primary motive for production in each case. As for possessory crimes, such as the forged card in *Campos-Serrano* and the cocaine in *State* v. *Dennis*, 16 Wash.App. 417, 558 P.2d 297 (1976), production by the defendants was critical to the request. Unlike the juvenile court's order, therefore, those directives had one primary goal: linking the objects to the suspects. Equating artifacts of a crime to a child is factually and legally unsupportable.

II. THE *PARENS PATRIAE* DUTY OF THE STATE TO PROTECT CHILDREN AT RISK OF HARM OVERRIDES THE MOTHER'S FIFTH AMENDMENT PRIVILEGE.

A. Protecting Children Is An Inviolable Obligation Of The State.

> Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.

May v. *Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J. concurring). Unquestionably, Maurice requires the state's assistance to ensure his safety. Once the juvenile court ordered shelter care to BCDSS on April 20, the dire hazards to Maurice from remaining in his mother's care have stood as the dominant facts in this case. Ms. Bouknight's defiance of the orders of shelter care and for production of Maurice places squarely before this Court a direct challenge to the juvenile court's ability to assist any child it has determined to be at serious risk of harm.

The Maryland court nevertheless ignored Maurice's desperate need for protection, focusing instead only on his mother's possible risk of self-incrimination. Its ready sacrifice of Maurice to the individual autonomous right of his parent completely subordinates the *parens patriae* functions of the juvenile court. This Court has never doubted the wisdom of maintaining a special tribunal whose benevolent mission and unique powers are devoted to child protection:

> The theory of the [Juvenile Court] is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge.

Kent v. *United States*, 383 U.S. 541, 554-55 (1966). The broad equitable powers now vested in juvenile courts reflect a societal consensus to moderate family autonomy

and parental rights whenever necessary to shield children from harm.[13]

A child's welfare must be safeguarded against all risks of harm. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), firmly established *parens patriae* as a vital state responsibility superseding even the constitutional rights of parents: "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." *Id.* at 165. The primacy of *parens patriae* is a longstanding rule applicable in all situations where family conflicts require judicial resolution: "The state, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984). Maryland has readily accepted *parens patriae* as a fundamental obligation of its equity jurisdiction over children. *Wentzel* v. *Montgomery General Hospital*, 293 Md. 685, 701-02, 447 A.2d 1244, 1252-53 (1982), *cert. denied*, 459 U.S. 1147 (1983).

The Maryland court's creation of a parental privilege to disobey a judicial command to produce a child inverts this *parens patriae* matrix of values. Inasmuch as it rewards a heightened suspicion of danger to the child with a greater solicitude to the parent's Fifth Amendment rights, the Maryland court's decision unravels *parens patriae* values at a time when the incidence of child abuse and neglect has surpassed epidemic proportions.[14]

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[13] CJP § 3-802 sets the protection and treatment of children as the foremost goal of Maryland's Juvenile Causes Act and mandates that its statutory provisions are to be liberally construed.

[14] The probable crisis in the child protection system comes at a time when that system is already overwhelmed by sharp increases in the confirmed incidence of child maltreatment nationwide. Child abuse reports rose 225% from 1976 through 1987. Of the more than two million child maltreatment reports received in 1987, an estimated 686,000 children were substantiated to be abused or neglected. *See* American Association for Protecting Children, American Humane Association, *Highlights of Official Child Neglect and Abuse Reporting 1987* 4, 10 (1989) [hereinafter cited as *Highlights*]. In 1986, the most recent year studied, 25% of the child protection cases resulted in court actions. *Highlights 1986* 42 (1988). In Maryland, child maltreatment reports rose 65% from 1981 to 1985, H.R. REP. NO. 260, 100th Cong. 1st Sess. Table 1, (Comm. Print, July 31, 1987). Despite this alarming increase, national child protection resources have increased by only 2% from 1981 to 1985. *Id.* at xiii, Findings.

B. A Balance Of Interests Is Necessary To Resolve Conflicts Between Neutral Statutes And The Fifth Amendment.

For more than a half century, this Court has tempered the Fifth Amendment privilege when confronted with vital interests and needs. The recognition that the privilege cannot be wielded to escape valid social obligations has not, however, compromised the vigilant protection of claims at the heart of the privilege: compulsory testimony, cross-examination, or custodial interrogation. Instead, the Court has employed threshold tests for determining the limited circumstances in which external factors can modify the privilege, relying on the inherent jurisdiction of a court (bankrupt's records), a special relationship (collective entity records), exigent circumstances (missing loaded gun), or a neutral noncriminal statute, to justify the incorporation of policy considerations in Fifth Amendment analysis.

Fifth Amendment cases considered by this Court have not presented as urgent a claim as Maurice's, nor satisfied so many thresholds and safeguards. Exigent circumstances obviously exist—a previously injured child has

been missing for more than a year. The order was issued by a special court empowered by neutral civil statutes to compel production. Most important, not one Fifth Amendment case previously before this Court has involved as intricate a confluence of competing rights—a child requiring protection, a child welfare system responsible for his safety, and a mother at risk of incrimination. The Maryland court nonetheless refused to weigh the interest of children in protection from harm against the risk to their parents of possible self-incrimination, perhaps recognizing that, however the balance is structured, a child's need for safety will always supersede the parent's individual rights.

This Court has had increasing occasion to comment on the burgeoning spectre of child abuse in our society. If the juvenile courts cannot be protected from a direct assault on the most fundamental of their *parens patriae* powers—the authority to compel the appearance of a child and, if needed, its placement into the state's custody—abused and neglected children will forfeit their best hope for safety.

1. Noncriminal Statutes Directed At The General Public May Override The Privilege.

Individuals have long been subject to statutory requirements to divulge incriminating information. If the state's demand is rooted in statute and is applied indiscriminately to the general public, the state can deny individual Fifth Amendment rights. Maryland's Juvenile Causes Act provides the court with authority to restrict the privilege in limited circumstances. CJP § 3-814(c).

The decisions mandating disclosure have either compelled individuals to answer affirmative questions or required the maintenance and surrender of potentially

incriminatory records (the required records exception). In the former category, individuals have been subject to statutory requirements to reveal incriminating information since *United States* v. *Sullivan*, 274 U.S. 259 (1927), upheld the income tax reporting requirement. The exception that required records must be maintained to allow "enforcement of restrictions validly established" first appeared in a dictum of *Wilson* v. *United States*, 221 U.S. 361, 380 (1911), and was finally established in *Shapiro* v. *United States*, 335 U.S. 1, 33-34 (1948). Where a statute puts most citizens at risk of self-incrimination or where it imposes reporting obligations as a means of enforcing public values, the Fifth Amendment does not always protect against disclosure of incriminating information.

Both doctrines were combined when *Albertson* v. *S.A.C.B.*, 382 U.S. 70, 79 (1965), established specific criteria to distinguish between permissibly broad statutory schemes, such as the tax code, and provisions targeting illegal activity: whether the statute is "neutral" on its face and "directed at the public at large" or "a highly selective group"; "whether the group is inherently suspect of criminal activity"; and whether the subject is "an essentially noncriminal and regulatory area of inquiry" or "an inquiry in an area permeated with criminal statutes." The *Albertson* criteria have all withstood subsequent scrutiny, as a 1968 trilogy of cases[15] struck down statutes which used tax reporting requirements "to require the individual to focus attention directly on behavior which was immediately recognizable as criminal in virtually

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[15] *Marchetti* v. *United States*, 390 U.S. 39, 57 (1968) (gambling); *Grosso* v. *United States*, 390 U.S. 62, 68 (1968) (gambling); *Haynes* v. *United States*, 390 U.S. 85, 99 (1968) (illegal firearms). *See also Leary* v. *United States*, 395 U.S. 6, 18 (1969) (marijuana).

every State in the Union." *California* v. *Byers*, 402 U.S. 424, 453 (1971) (Harlan, J. concurring).

This Court has acknowledged that its balancing of exigent public needs against individual liberties is the actual mechanism underlying *Albertson*. In *California* v. *Byers*, the Court upheld a law requiring drivers in auto accidents to reveal their names and addresses:

> Tensions between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

Id. at 427 (Burger, C.J. plurality). The plurality strictly applied *Albertson*, noting that the reporting provision in question was directed at activities without illegal or criminal connotations, had a noncriminal statutory purpose, and was absolutely necessary to fulfill the law's objectives. Ultimately, the Court upheld the statute by balancing these interests against the minimal risk of self-incrimination to all drivers, ignoring Byers' well-founded fears. *Id.* at 430-31. Justice Harlan concurred in the appropriateness of balancing but framed his test in less expansive terms: "the noncriminal governmental purpose in securing the information, the necessity for self-reporting . . . and the nature of the disclosures involved." *Id.* at 458.

2. Balancing Is Also Required By Nonstatutory Disclosure Requirements.

The Byers/Albertson balancing test confirms that compelling public interests can override assertions of the Fifth Amendment privilege. Statutory mandates requiring production are neither the sole nor the first instance of Fifth Amendment balancing. The "collective entities" doctrine has maintained a public policy justification for the production of corporate records since *Hale* v. *Henkel* was decided in 1906; this focus culminated last year when *Braswell* highlighted the importance of white-collar crime prevention.

Only a balancing of civil and criminal interests can explain the results in *McCarthy* v. *Arndstein*, 266 U.S. 34 (1923), which held the privilege applicable to civil proceedings yet also allowed for the compulsory surrender of personally incriminating records. The public interest was not mentioned, as the Court focused instead on the inherent jurisdiction of the civil court:

> The law requires a bankrupt to surrender his property. The books and papers of a business are a part of the bankrupt estate. To permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property.

Id. at 41 (citations omitted). Likewise, juvenile courts must retain the inherent right to compel production of any child within the court's jurisdiction regardless of whether his/her production is incriminating. The privilege may be broadly applicable in civil proceedings, but its assertion cannot impede powers which are integral to the court's particular jurisdiction.

Finally, when exigent hazards endanger the public safety, "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *New York* v.

Quarles, 467 U.S. 649, 657 (1984). The Court's recognition that critical Fifth Amendment safeguards provided by Miranda warnings must yield if their exercise could endanger lives revealed the practical limitations which are always placed on the privilege. As Justice Harlan noted in *Byers*, "it is the task of this Court continually to seek that line of accommodation which will render this provision relevant to contemporary conditions. In other words, we must deal in degrees in this troublesome area." 402 U.S. at 454.

C. The Compelling Interest In Protecting Children Outweighs The Privilege.

1. The Vital Need For Maurice's Production Satisfies *Byers* And Other Fifth Amendment Balancing Tests.

a. CJP § 3-814(c) Is A Neutral, Noncriminal Statute Directed At A Non-Suspect Class.

Maryland's Juvenile Causes Act, CJP § 3-814(c) in particular, bears little resemblance to the unconstitutional statutes in *Albertson* and *Marchetti*, since a requirement that parents bring their children to the juvenile court in no way "focus[es] almost exclusively on conduct which [is] criminal." *California* v. *Byers*, 402 U.S. at 454 (Harlan, J. concurring). The sole purpose of CJP § 3-814(c) is to secure the appearance of children who either require the court's protection or who need to be examined by protective service workers. Most of these children have not been the victims of crimes; many are runaways, truants, delinquents, neglected children, or disabled children requiring special services. Even among those who may have been abused, the injuries will often have been inflicted by a third party. At most, the obligation to present their children to the court targets only those parents who defy the judicial process, not those who engage in criminal acts.

Equally as important, the Juvenile Causes Act is a civil statute, therapeutic in purpose and effect, whose principal objective is "to provide for the care, protection and wholesome mental and physical development of children . . . and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest." CJP § 3-802(a)(1). The Maryland court has emphasized the civil nature of juvenile cases:

> The General Assembly has classified juvenile proceedings as civil and not criminal in nature. Moreover, the legislative intention underlying a CINA proceeding is not to punish the parent; rather, the purpose is to protect the child and provide for his best interests. Additionally it cannot be said that the potential CINA "sanctions" are "so punitive . . . in . . . effect as to negate that intention."

In re John P., 311 Md. 700, 709, 537 A.2d 263, 268 (1988) (citations omitted). *See also In re Neil C.*, 308 Md. 591, 597, 521 A.2d 329, 332 (1987). CINA adjudications thus apply functional definitions for family problems, not pejorative labels such as "abuse" or "neglect." *See* CJP § 3-801(e). Ms. Bouknight benefited substantially from the remedial purposes of the juvenile court. Finally, while the Act does have some potential for criminal sanctions, *see* CJP § 3-831, this rarely exercised penalty[16] does not by itself criminalize the statute or transform its objectives

[16] On May 26, 1989, James L. Benton, administrator of the Baltimore City juvenile court, reported to counsel for Maurice M. that since 1976 no more than five cases a year have been filed in the juvenile court which claim, pursuant to CJP § 3-831, that an adult's conduct contributed to a child's delinquency or need of supervision or assistance.

from the protection of children to the punishment of parents. *See In re John P.*, 311 Md. at 706, 537 A.2d at 267.

b. CSPS § 3-814(c) Serves A Vital Public Role.

Three cases recently decided by this Court reflect the unfortunate truism that "[c]hild abuse is a problem of disturbing proportions in today's society." *Coy* v. *Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 2803 (1988) (O'Connor, J. concurring); *Deshaney* v. *Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1007, 1012-13 (1989); *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987). As the incidence of confirmed reports of child maltreatment rises, *see* note 14, pp. 24-25 *supra; Coy* v. *Iowa*, 108 S.Ct. at 2808 (Blackmun, J. dissenting), the juvenile courts are confronting an ever increasing volume of cases.[17] Steady rises in the incidence of poverty among children, single-parent households, and substance abuse will only intensify the socioeconomic pressures which spawn abuse and neglect. Children's Defense Fund, *A Vision for America's Children* 46-53 (1989) (*"CDF"*).[18]

Against this depressing backdrop, courts must have an effective mechanism to compel compliance with their orders. In most protective services cases, judicial intervention is the option of last resort, sought only when persuasion is needed to induce compliance, preventive efforts have failed, or a serious emergency exists. *See*

[17] This Court has commented previously on the limited resources available to juvenile courts to intervene effectively in family problems. *Breed* v. *Jones*, 421 U.S. 519, 537 (1975).

[18] Current studies by the Children's Defense Fund project by the year 2000 an increase of 3 million children living in poverty, 2.8 million households headed by females, and 500,000 children placed in some type of foster care setting. *CDF* at 46. The last projection would roughly double the current foster care population.

Brief of Amicus Commonwealth of Massachusetts at 15, 18-24. Even then, juvenile courts have few powers available to combat a parent's recalcitrance except orders to compel production and, ultimately, contempt.[19] If protective service workers have been denied access to the child, production of the child to the court may well provide the only mechanism for determining whether maltreatment has occurred and its extent.[20] Further, for children older than Maurice, appearance at court is crucial to confer with counsel and participate actively in hearings.[21] Thus, every state but Maine has a statutory provision analogous to CJP § 3-814(c) requiring parents to produce their children to court when requested. *See* Table of Juvenile Court Production Statutes, *infra*, at 1a-2a.

c. The Mother's Limited Risk Of Incrimination Does Not Justify Her Fifth Amendment Claim.

Most parents subject to CJP § 3-814(c) bear little or no fear of incriminating themselves since production of a

[19] A recent survey by the National Council of Juvenile and Family Court Judges ("NCJFCJ") revealed that 58% of all such judges used contempt as their primary method of enforcing orders against parents. NCJFCJ, *Judicial Authority and Responsibility: 18 Recommendations on Issues in Delinquency and Abuse/Neglect Dispositions* 17-18 (1989). *See also* Brief of Amicus Charles M. at 20-21, 46-47.

[20] Protective service workers must, under Maryland law, see the child and make a determination of safety within 24 hours of receipt of an abuse report and within five days of a neglect report. FL § 5-706(b) (1988 Supp.).

[21] Md. Rule 910(b), for instance, only allows a child to be excluded from court hearings temporarily if the court finds it in his or her best interest or welfare. Under Md. Rule 915(d), all children committed to BCDSS must attend periodic hearings to review their status unless the court finds that attendance would cause serious harm. *See* American Bar Association, *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties* 3.1(b)(ii)[6], at 17 (1980).

child pursuant to a lawful order "is an essentially neutral act." *Byers*, 402 U.S. at 432 (Burger, C.J. plurality). For infants in particular, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania* v. *Ritchie*, 480 U.S. at 60. Despite Maurice's previous injuries, his mother was not charged with criminal child abuse.

Under *Byers*, this minimal degree of incrimination does not override public policies. The suspect there had a "very real" fear of prosecution, but in the absence of a general risk to the target population, the plurality found it "insufficient to defeat the strong policies in favor of a disclosure." *Byers*, 402 U.S. at 428. While Justice Harlan believed that the individual risk should factor into the balance, he concluded that Byers' significant fear of incrimination did not trigger the privilege because "the state must still bear the burden of making the main evidentiary case here against the [suspect]." *Id.* at 457.[22] Since a prosecution against the mother would require independent evidence to establish that her custody of Maurice "was proximately related" to his injuries, *id.*, it is not a substantial risk which implicates the privilege.

d. The Fifth Amendment Balance Must Be Struck For The State's Duty To Protect Maurice's Safety.

The Maryland court's indifference to Maurice's plight cannot be countenanced. By failing to balance his and the

[22] The focus on the prosecutor's remaining burden as a method of determining the suspect's exposure was used by this Court in *Doe II*, when it noted that the action of the suspect did not reveal information to the government. "The Government must locate that evidence 'by the independent labor of its officers . . .'" *Doe II*, 108 S.Ct. at 2350 (citation omitted).

state's compelling interest in his protection, the Maryland court abandoned its *parens patriae* obligation to marshal every available power to ensure his safety. Public needs can temper extravagant Fifth Amendment claims, especially when vital interests irreconcilably conflict.

The tragic facts of the instant case apply to virtually every doctrine this Court has established to weigh competing Fifth Amendment interests. Like *Byers*, this case involves a neutral civil statute and a class of individuals (parents) not inherently suspected of criminal acts. Urgent action is needed to address exigent circumstances as both *Quarles* and *Shapiro* allow. Consistent with *Braswell* and *Bellis*, Ms. Bouknight's relationship with her son is, while under juvenile court jurisdiction, a special legally protected status which entitles the state to monitor and intervene. Child welfare is as quintessential a state responsibility as fighting white-collar crime was in *Braswell*. Most important, the jurisdiction of the juvenile court is challenged here by the Fifth Amendment claim just as the bankruptcy court's civil authority was in *McCarthy* v. *Arndstein*. Under these standards, denial of the juvenile court's power to compel Maurice's production is unacceptable.

2. Rights Which Jeopardize The Life Or Health Of Children Are Not Constitutionally Protected.

The assertion of an otherwise valid constitutional right can never justify dereliction of a child's care. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children . . . ." *Prince* v. *Massachusetts*, 321 U.S. at 170. When conflicts have arisen between the state's compelling interest in the protection of children and the individual liberties of their parents or other

adults, this Court has consistently held that the Constitution does not immunize acts which endanger children. Instead, a balance of interests measures the degree of risk to individual children. The Court's holding in *Prince*, while limited to First Amendment issues, has been extended to every other constitutional context in which individual rights clash with a child's life, health or welfare. Balancing remains the only appropriate vehicle for resolving fundamental but irreconcilable claims under the Constitution.

In those constitutional arenas where fundamental rights of adults have challenged the interests of children, the life and welfare of the child emerge consistently as dominant considerations. The First Amendment cases best reflect the use and outcome of balancing: "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes to some extent, matters of conscience and religious conviction." *Id.* at 167. Since *Prince*, most of the tensions between parents claiming religious freedom and the state's *parens patriae* authority have involved the parents refusing critical medical treatment for children. Citing *Prince* as dispositive authority, this Court authorized juvenile courts to allow blood transfusions to children despite the spiritual objection of their parents. *Jehovah's Witnesses* v. *King County Hospital*, 390 U.S. 598 (1968), *aff'g per curiam*, 278 F.Supp. 488 (W.D.Wash. 1967).[23] Faith-healing cases have all emphasized that the

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[23] Courts have relied on *Prince* in numerous "faith-healing" cases to find that the state's inherent interest in the life and health of children of tender years is sufficiently compelling to outweigh the infringement of religious freedoms. *See, e.g., Walker* v. *Superior Court (People)*, 47 Cal.3d 112, 253 Cal. Rptr. 1, 763 P.2d 852 (1988), *cert. filed*, 57 U.S.L.W. 3622 (U.S. March 6, 1989) (No. 88-1471); *People in*

lawful exercise of *parens patriae* powers over religious freedoms must be predicated on both a compelling state interest as well as an absence of less restrictive or intrusive methods of protecting children.

When children face vague or minor threats to their health and welfare, state authority can be curtailed by valid First Amendment claims.[24] *Parens patriae* thus requires either an individualized finding of real or potential harm or an obvious risk of injury to all children. Hence, even though child pornography and indecent language may be protected under the First Amendment, the inherent danger to the physical and psychological health of children allows the government to ban or regulate their dissemination. *New York* v. *Ferber*, 458 U.S. 747, 756-57 (1982); *Federal Communications Commission* v. *Pacifica Foundation*, 438 U.S. 726, 750-51 (1978); *Ginsberg* v. *New York*, 390 U.S. 629, 638-40 (1968).

Balancing has also restricted the Fourth Amendment rights of parents. In upholding the right of a welfare caseworker to require home visits as a condition for benefits, this Court found the intrusion permissible under the Fourth Amendment by focusing on child protection:

Interest of D.L.E., 645 P.2d 271 (Colo. 1982); *Bergmann* v. *State*, 486 N.E.2d 653 (Ind.App. 1985); *In re Willmann*, 24 Ohio App. 3d 191, 493 N.E.2d 1380 (1986); *Commonwealth* v. *Barnhart*, 345 Pa. Super. 10, 497 A.2d 616 (1985), *app. denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 55 (1988).

[24] In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), for instance, this Court explicitly denied an effort to enforce state compulsory education statutes because, unlike *Prince*, the case was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare [had] been demonstrated or may [have] been properly inferred." *Id.* at 230.

> The public's interest . . . is protection and aid for the dependent child . . . . There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.

Wyman v. *James*, 400 U.S. 309, 318 (1971). Prominent among the other legal justifications for the intrusion were factors comparable to the instant case: an absence of practical alternatives, a sharp distinction between social workers and the police, the civil, nonprosecutorial nature of the home visit, and a concern for the "sad and unhappy" conditions in which the mother cared for her "infant Maurice". *Id.* at 322-23 and n.9.[25]

Even constitutional rights accorded to criminal suspects are subject to modifications if their assertion can be established as injurious to specific children. The Sixth Amendment right to confrontation, for instance, does not require child abuse victims to testify openly before an alleged assailant if "individualized findings" are made that the child "need[s] special protection." *Coy* v. *Iowa*, 108 S.Ct. at 2803. "[I]f a court makes a case-specific finding of

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[25] In other Fourth Amendment contexts, this Court has determined that compelling state interests in avoiding "disastrous consequences" warrant limitations of individual rights. *Skinner* v. *Railway Labor Executives Ass'n*, ____ U.S. ____, 109 S.Ct. 1402, 1408 (1989). There too, the issues underlying the balance—diminished expectation of privacy and participation in a "pervasively" regulated activity, *id.* at 1418, an absence of practical alternatives, *id.* at 1416, and life-threatening risks, *id.* at 1419—are directly applicable. However the balance is structured, the Fourth Amendment analysis holds that averting grievous injury or loss of life supersedes all other interests, regardless of whether it is the state or an individual whose action endangers others. *Tennessee* v. *Garner*, 471 U.S. 1, 11-12 (1985).

necessity . . . the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.* at 2805 (O'Connor, J. concurring) (citations omitted). Similarly, since a criminal defendant's request to examine confidential child abuse reports has a "seriously adverse effect on efforts . . . to uncover and treat abuse," the Confrontation Clause requires a judge to conduct an *in camera* inspection to determine the defendant's need for the information. *Pennsylvania* v. *Ritchie*, 480 U.S. at 60. *Ritchie* found a "compelling interest" in confidentiality by focusing on the chilling effect on children who might be too frightened to report abuse if disclosure were allowed. *Id.* As evidence of that impact, the establishment of comparable rules in all fifty states helped persuade the Court of the "importance" of the public interest at stake. *Id.* at n. 17.

Maurice's need for protection stands independent of either the state's or his mother's interest in this case. "In our society, parental rights are limited by the legitimate rights and interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 630 (1979) (Brennan, J. concurring). By refusing to bring Maurice to court, his mother effectively denied him a fundamental right of access to judicial relief guaranteed by the Juvenile Causes Act and procedural due process under the Fourteenth Amendment. *See Boddie* v. *Connecticut*, 401 U.S. 371, 374-77 (1971) (denial of access to only forum for judicial relief violates due process); *cf. In re Gault*, 387 U.S. 1 (1967). Indeed, her interference with Maurice's placement in shelter care has deprived him of his fundamental right to appropriate care and custody. Since the Maryland court has immunized Ms. Bouknight's abrogation of Maurice's rights, requisite state action is present. *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18 (1948). Maurice thus has crucial rights under the

Fourteenth Amendment which, by analogy,[26] can override his mother's privilege.

3. The Balance Must Be Struck For Maurice's Production.

Maurice must receive the same degree of protection against serious risk of harm posed by his mother's Fifth Amendment claim as this Court has accorded to children under First, Fourth, Sixth, and Fourteenth Amendment doctrines. The Fifth Amendment should not confer a greater immunity to parents than provided elsewhere in the Constitution, especially given the issues raised here. First, the state has a paramount stake in assuring Maurice's safety. "It is evident beyond the need for elaboration that a State's interest in 'safe-guarding the physical and psychological well-being of a minor' is 'compelling.'" *New York* v. *Ferber*, 458 U.S. at 756-57 (citation omitted). Since the mother's claim would effectively nullify significant portions of Maryland's Juvenile Causes Act and comparable provisions in other states, the state has a strong interest in vindicating its *parens patriae* power. As for the mother, her Fifth Amendment claim is far too tenuous. The order of production was preceded by an uncontested judicial finding of risk to Maurice. Its terms do not require her to testify or face interrogation, the two historical grounds for invoking the privilege. Indeed, the mother's exercise of the privilege must be weighed carefully against her record of recalcitrance, manipulation and defiance. Maurice's interests are self-evident; his life, health and nurturance cannot be assured without state intervention.

[26] Children's privacy rights under the due process clause can outweigh both their parents' right to control their access to reproductive or contraceptive services and the state's interest in regulating that access. *Carey* v. *Population Services International*, 431 U.S. 678, 694 (plurality op.) (1977); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 74-75 (1976).

The Maryland court's decision holds devastating consequences for Maurice, but its consequences for other children requiring judicial protection are just as disastrous. Although the decision purports to limit its impact to those cases where the prospect of incrimination is high, all parents suspected of abuse would enjoy a privilege to harbor their children without interference. Indeed, even though the risks to the child's welfare mount in at least direct proportion to the severity of the suspected abuse, the Maryland court's calculus affords children the least protection when the dangers are greatest.

In practical terms, the decision will obstruct numerous aspects of child welfare practice. Whenever the state suspects a child to have been abused or neglected, social work intervention with parents might be forbidden unless accompanied by Miranda warnings bound to frustrate a therapeutic relationship. Even in parental kidnapping cases, the privilege would eliminate all impetus for relinquishing an abducted child. Most important, juvenile courts will be deterred from reuniting children with their families if they lack the power to compel compliance with orders of protective supervision. *See* CJP § 3-802(a)(3), 42 U.S.C.A. § 671(a)(15)(b) (West 1983). The child welfare system of every state would be frozen in a constitutional gridlock, abandoning children to otherwise preventable abuse or neglect and prolonged placements in foster care.[27]

[27] Within the past two decades, numerous legislative initiatives have focused on the scourge of child abuse and neglect: The federal Child Abuse Prevention and Treatment Act, 42 U.S.C.A. § 5101 *et. seq.* (West 1983 and Supp. 1989), successfully used federal grants as

Maurice and BCDSS have no other alternatives except an order of production. The juvenile court has no authority to confer constructive use immunity on Ms. Bouknight, *Doe I*, 465 U.S. at 616-17; *Pillsbury* v. *Conboy*, 459 U.S. 248, 261 (1983), nor can it compel production by deferring judgment on the Fifth Amendment claim to a criminal suppression hearing. *Pillsbury* v. *Conboy*, 459 U.S. at 262. This Court therefore must choose between Maurice's safety and his mother's privilege, a decision which must be grounded in the fundamental values and priorities of our society. Maurice is now two and a half years old. The most recent medical information available is almost two years old. For over a year, he has been concealed and made inaccessible to those responsible for determining his safety. A societal consensus therefore requires this Court to uphold Maurice's right to safety and health, if not provided by his mother, then by the state.

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incentives for states to establish strict reporting laws. Similarly, the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C.A. §§ 620-627, 670-676 (West 1983), overhauled federal funding for child welfare programs to promote preventive services to remedy abuse and neglect prior to judicial intervention. The inability of states to enforce these federal mandates might raise concern for their eligibility for continued federal funds. *See* Brief of Amicus U.S. Conference of Mayors, at 10 n.6.

CONCLUSION

For the foregoing reasons, the Court of Appeals of Maryland erred as a matter of law, and its decision must be reversed.

Respectfully submitted,

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APPENDIX

TABLE OF JUVENILE COURTS CHILD PRODUCTION STATUTES

APPENDIX

Ala. Code § 12-15-53 (1986)
Alaska Stat. § 47.10.030 (1984)
Ariz. Rev. Stat. Ann. 8-411, 231.03, 248, (1974)
Ark. Stat. Ann. § 9-27-339 (1987)
Cal. Welf. & Inst. Code §§ 364, 338 (West 1984)
Colo. Rev. Stat. § 19-2-102 (1986)
Conn. Gen. Stat. § 46B-101 (1986)
Del. Code Ann. tit. 10, § 935 (1974)
D.C. Code Ann. § 16-2306 (1981)
Fla. Stat. § 39.437 (1988)
Ga. Code Ann. § 15-11-19 (1985)
Hawaii Rev. Stat. § 571-31 (1976 & Supp. 1984)
Idaho Code § 16-1606 (1979 & Supp. 1988)
Ill. Rev. Stat. ch. 37, § 802-15 (1988)
Ind. Code § 31-6-7-4 (1987)
Iowa Code § 232.37 (1985 & Cum. Supp. 1989)
Kan. Stat. Ann. § 38-1533 (1986)
Ky. Rev. Stat. Ann. § 610.040 (Baldwin 1987)
La. Code Juv. Pro. Ann. art. 13 §§ 1590, 1710 (West 1983)
Maine: No Relevant Statute
Md. Cts. & Jud. Proc. Code Ann. § 3-814 (1984 & Supp. 1988)
Mass. Gen. Laws Ann. ch. 119, § 24 (West 1989)
Mich. Comp. Laws § 712A.12 (1968 & Supp. 1988)
Minn. Stat. § 260.171 (1982 & Cum. Supp. 1989)
Miss. Code Ann. §§ 43-21-501, 509 (1972)
Mo. Rev. Stat. §§ 211.101, 121, 141 (Vernon 1983)
Mont. Code Ann. § 41-5-502 (1987)
Neb. Rev. Stat. §§ 43-262, 270 (1978)
Nev. Rev. Stat. §§ 432B.520 (1985)
N.H. Rev. Stat. Ann. §§ 169-C:8, :9, :11 (1979 & Supp. 1987)

N.J. Rev. Stat. § 9.6-8.38 (1939 & Supp. 1977)
N.M. Stat. Ann. § 32-1-20 (1978)
N.Y. Fam. Ct. Act. § 1035 (McKinney 1983 & Supp. 1989)
N.C. Gen. Stat. §§ 7A-564, 565 (1986 & Supp. 1988)
N.D. Cent. Code § 27-20-15 (1987)
Ohio Rev. Code Ann. §§ 2151.28, 30 (Anderson 1976 & Supp. 1988)
Okla. Stat. tit. 10, §§ 1104, 1106 (1987 & Supp. 1989)
Or. Rev. Stat. §§ 419.486-490 (1987)
Pa. Stat. Ann. tit. 42, § 6335 (Purdon 1982 & Supp. 1988)
R.I. Gen. Laws. §§ 40-11-12, 11-7.1 (1984)
S.C. Code Ann. §§ 20-7-745, 750 (Law Co-op 1982)
S.D. Codified Laws Ann. § 26-8-17 (1984)
Tenn. Code Ann. §§ 37-1-121, 122 (1984)
Tex. Fam. Code Ann. §§ 14.30, 50, 51 (Vernon 1988)
Utah Code Ann. §§ 78-38-26, 28 (1987)
Vt. Stat. Ann. tit. 33, §§ 647, 649 (1981)
Va. Code Ann. § 16.1-263-4 (1988)
Wash. Rev. Code § 13.34.070 (1989)
W. Va. Code § 49-5-7 (1986)
Wis. Stat. §§ 48.27, 28 (1982) & Supp. 1988)
Wyo. Stat. §§ 14-6-214, 6-215 (1986)

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE ANNOTATED

Title 42

§ 671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—

* * *

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

* * *

(b) Failure of State to comply with plan provisions

The Secretary shall approve any plan which complies with the provisions of subsection (a) of this section. However, in any case in which the Secretary finds, after reasonable notice and opportunity for a hearing, that a State plan which has been approved by the Secretary no longer complies with the provisions of subsection (a) of this section, or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, the Secretary shall notify the State that further payments will not be made to the State under this part, or that such payments will be made to the State but reduced by an amount which the Secretary determines appropriate, until the Secretary is satisfied that there is no longer any such failure to comply, and until he is so satisfied he shall make no further payments to the State, or shall reduce such payments by the amount specified in his notification to the State.

ANNOTATED CODE OF MARYLAND

COURTS AND JUDICIAL PROCEEDINGS

§ 3-801. Definitions.

* * *

(e) *Child in need of assistance.*—"Child in need of assistance" is a child who requires the assistance of the court because

(1) He is mentally handicapped or is not receiving ordinary and proper care and attention, and

(2) His parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and his problems provided, however, a child shall not be deemed to be in need of assistance for the sole reason he is being furnished nonmedical remedial care and treatment recognized by State law.

§ 3-802. Purposes of subtitle.

(a) The purposes of this subtitle are:

(1) To provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this subtitle; and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest;

(2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior;

(3) To conserve and strengthen the child's family ties and to separate a child from his parents only when necessary for his welfare or in the interest of public safety;

(4) If necessary to remove a child from his home, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents;

(5) To provide judicial procedures for carrying out the provisions of this subtitle.

(b) This subtitle shall be liberally construed to effectuate these purposes. (An. Code 1957, art. 26, § 70; 1973, 1st Sp. Sess., ch. 2, § 1; 1974, ch. 691, § 8; 1975, ch. 554, §§ 1, 3.)

§ 3-814. Taking child into custody.

* * *

(c) If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt. (An. Code 1957, art. 26, §§ 70-9, 70-10; 1973, 1st Sp. Sess., ch. 2, § 1; 1974, ch. 691, § 8; 1975, ch. 554, §§ 1, 3.)

§ 3-815. Detention and shelter care prior to hearing.

* * *

(b) If a child is taken into custody, he may be placed in detention or shelter care prior to a hearing if:

(1) Such action is required to protect the child or person and property of others;

§ 3-831. Contributing to certain conditions of child.

(a) It is unlawful for an adult wilfully to contribute to, encourage, cause or tend to cause any act, omission, or condition which results in a violation, renders a child delinquent, in need of supervision, or in need of assistance.

(b) A person may be convicted under this section even if the child has not been found to have committed a violation, adjudicated delinquent, in need of supervision, or in need of assistance. However, the court may expunge a delinquent adjudication from the child's record and enter it as a finding in the adult's case.

(c) An adult convicted under this section is subject to a fine of not more than $2,500 or imprisonment for not more than 3 years, or both. The court may suspend sentence and place the adult on probation subject to the terms and conditions it deems to be in the best interests of the child and the public. (An. Code 1957, art. 26, §§ 70-24, 91, 93,

99; 1973, 1st Sp. Sess., ch. 2, § 1; 1975, ch. 554, §§ 1, 3; 1977, ch. 846; 1982, chs. 111, 844.)

§ 9-108. Attorney-client privilege.

A person may not be compelled to testify in violation of the attorney-client privilege. (1973, 1st Sp. Sess., ch. 2, § 1.)

§ 9-110. Accountants.

(a) *Privilege.*—A certified public accountant, public accountant, or any person employed by him may not disclose the contents of any communication made to him by a person employing him to examine, audit, or report on any book, record, account, or statement nor may he disclose any information derived from the person or material in rendering professional service unless the person employing him or his personal representative or his successor in interest permits it expressly.

(b) *Exception.*—This privilege does not affect the criminal laws of the State or the bankruptcy laws. (An. Code 1957, art. 75A, § 21; 1973, 1st Sp. Sess., ch. 2, § 1; 1974, ch. 691, § 8.)

§ 9-111. Minister, clergyman, or priest.

A minister of the gospel, clergyman, or priest of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation. (An. Code 1957, art. 35, § 13; 1973, 1st Sp. Sess., ch. 2, § 1.)

§ 12-303. Appeals from certain interlocutory orders.

(a) A party may appeal from:

* * *

(3) An order:

* * *

(x) Depriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order. (An. Code 1957, art. 5, §§ 1A, 3, 7,

8A, 20A, art. 7, § 18; 1973, 1st Sp. Sess., ch. 2, § 1; 1975, ch. 349; 1984, ch. 255.)

§ 12-701. Stays.

* * *

(b) *Court sitting as a juvenile court.*—An appeal from the judgment of a juvenile court, including the District Court, in the exercise of its juvenile jurisdiction in Montgomery County, and with respect to a child, does not stay the final judgment appealed from, nor does it discharge the child from custody of a person, institution, or agency to whose care the child was committed by the court. The appellate court may authorize a stay, on application and hearing, if it finds that suitable provision is made for the care and custody of the child. (An. Code 1957, art. 5, §§ 11, 24, art. 26, §§ 70-25, 87; 1973, 1st Sp. Sess., ch. 2, § 1.)

FAMILY LAW

§ 5-203. Natural guardianship; powers and duties of parents; award of custody to parent.

* * *

(b) *Powers and duties of parents.*—The parents of a minor child:

(1) are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and

(2) have the same powers and duties in relation to the child.

§ 5-706. Investigation.

* * *

(b) *Time for initiation; actions to be taken.*—Within 24 hours after receiving a report of suspected abuse and within 5 days after receiving a report of suspected neglect, the local department or the appropriate law enforcement agency shall:

(1) see the child;

(2) attempt to have an on-site interview with the child's caretaker;

(3) decide on the safety of the child, wherever the child is, and of other children in the household; and

(4) decide on the safety of other children in the care or custody of the alleged abuser.

§ 10-219. Prohibited acts; penalties.

(a) *Duty to care for and provide for child.*—An individual who has care, custody, or control of a minor child may not desert the child:

(1) with the intent that the child become a public charge; or

(2) without providing for the child's support for at least 3 years by a responsible individual or a licensed child care facility.

MARYLAND RULES

Rule 906. Right to Counsel.

a. In All Proceedings—Appearance of Out-of-State Attorney.

The respondent is entitled to be represented in all proceedings under this Chapter by counsel retained by him, his parent, or appointed pursuant to the provisions of subsection b 2 and 3 of this Rule. An out-of-state attorney may enter his appearance and participate in a cause only after having been admitted in accordance with Rule 20 of the Rules Governing Admission to the Bar of Maryland (Special Admission for Out-of-State Attorneys). Once so admitted, his appearance and participation is limited by the restrictions of that Rule.

* * *

b. Waiver of Representation—Indigent Cases—Non-Indigent Cases.

* * *

2. Representation of Indigents.

(a) Unless knowingly and intelligently waived, and unless counsel is otherwise provided, an indigent party, or an indigent child whose parents are either indigent or unwilling to employ counsel, shall be entitled to be represented by the Office of the Public Defender at any stage in a waiver, adjudicatory or disposition hearing, or hearing under Rule 916 (Modification or Vacation of Order).

(b) Upon request or upon the court's own motion, the Office of the Public Defender shall appoint separate counsel to represent any indigent party other than the child if the interests of the child and those of the party appear to conflict, and if such counsel is necessary to meet the requirements of a fair hearing.

Rule 910. Hearings—Generally.

* * *

b. Place of Hearing.

A hearing may be conducted in open court, in chambers, or elsewhere where appropriate facilities are available. The hearing may be adjourned from time to time and may be conducted out of the presence of all persons except those whose presence is necessary or desirable. If the court finds that it is in the best interest and welfare of the child, his presence may be temporarily excluded except when he is alleged to have committed a delinquent act.

Rule 911. Masters.

a. *Authority.*

1. Detention or Shelter Care.

A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters.

A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the

court.

Rule 915. Disposition Hearing.

* * *

d. *Commitment to Department of Social Services.*

In cases in which a child is committed to a local department of social services for placement outside the child's home, the court, within 18 months after the original placement and periodically thereafter at intervals not greater than 18 months, shall conduct a review hearing to determine whether and under what circumstances the child's commitment to the local department of social services should continue. Considerations pertinent to the determination include whether the child should (1) be returned home, (2) be continued in foster care for a specified period, (3) be placed for adoption, or (4) because of the child's special needs or circumstances, be continued in foster care on a permanent or long-term basis. The hearing shall be conducted as prescribed in Rule 910 or, if conducted by a master, as prescribed in Rule 911, except that the child's presence shall not be required if presence at the hearing is likely to cause serious physical, mental, or emotional harm to the child. (Amended Nov. 5, 1976, effective Jan. 1, 1977; Apr. 18, 1980, effective July 1, 1980; June 23, 1983, effective July 1, 1983).

APPENDIX: RULES OF PROFESSIONAL CONDUCT

Rule 1.6 Confidentiality of Information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

(4) to comply with these Rules, a court order or other law.